Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

No. 80-636

DIANNE MacKINNEY and
GRETA GELFGREN,

Appellants,

vs.

ROSALIND GELFGREN, LARRY GELFGREN,
REPUBLIC NATIONAL LIFE INSURANCE COMPANY,
and ILWU-PMA WELFARE FUND,

Appellees.

MOTION TO DISMISS OR AFFIRM

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and
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

DIANNE MacKINNEY and
GRETA GELFGREN,

Appellants,

vs.

UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT,

Respondent.

No. 80-636

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellees, ROSALIND GELFGREN and LARRY GELFGREN respectfully move to dismiss the appeal in the above entitled matter and to affirm the judgment sought to be reviewed on the following grounds:

1. The appellees move to dismiss the appeal in that the appeal is not within the jurisdiction of this court because not taken in conformity to statute. The jurisdictional

statement indicates appeal is taken pursuant to 28 U.S.C. Section 1254 (2). (page 5 Jurisdictional Statement). The said Code Section provides this honorable Court may review Court of Appeals' decisions

> "by appeal by a party relying on a State statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, that such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"

The jurisdictional statement appends thereto the memorandum decision of the Court of Appeals for the Ninth Circuit as Appendix C. (See pages C-1 through C-11). The Court of Appeals Decision does not invalidate any State statute. The decision merely holds the Court is limited in its review of the eligibility requirements in collective bargaining pension or welfare plan to determine "whether the challenged requirements are arbitrary, capricious, or unreasonable". (Jurisdictional Statement C-7). The Ninth Circuit Opinion reversed the District Court and held the reqiurements here in issue had a reasonable purpose and therefore are not arbitrary or unreasonable. (Jurisdictional Statement C-8).

It is therefore submitted the appeal is ill-taken and should be dismissed.

2. Appellees further move to dismiss the appeal on the ground no constitutional issue is raised. Therefore the Court should not set the case for argument.

The Jurisdictional Statement presents two claims of constitutional issues. At page 16 the claim is first made Dianne MacKinney was deprived of benefits in violation of the Fifth Amendment of the Constitution. No citation or argument is advanced in support of this conclusion. The Ninth Circuit Opinion merely concluded this particular claimant did not meet the requirements negotiated by the employers and Union. (Jurisdictional Statement C-8). There is no showing in the Jurisdictional Statement how the Fifth Amendment is involved.

The second contention in the Jurisdictional Statement is that Greta was denied her constitutional rights of equal protection and due process. The argument advanced is that Greta was discriminated against due to her illegitimacy. (Jurisdictional Statement pages 16 through 19.). No constitutional issue arises in that the decision does not turn on the legitimacy or illegitimacy of the children. The decision merely holds it is not unreasonable or arbitrary to require the decedent to have claimed a minor child on his income tax return in order for the child to be eligible for benefits. (Jurisdictional Statement C-8 and C-9).

Neither 28 U.S.C. Section 152 nor *California Revenue and Taxation Code 17056* place a legitimacy test on a claim for dependant daughter. The only requirement in each section is that the dependant daughter received over half her support from the parent claiming the daughter. Thus there is no legitimacy test involved in the present case. Therefore there is no constitutional issue of either equal protection or due process of law as to the illegitimate child, Greta. The appeal has no merit and should be dismissed.

3. Appellees move the judgment of the Ninth Circuit be affirmed in that it is manifest the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The decision of the Ninth Circuit merely reaffirms the prior decisions as to review of eligibility requirements in collective bargaining welfare plans. Applying that test the Court merely holds the requirements are not arbitrary or unreasonable.(Jurisdictional Statement pages C-7 and C-8). No new principle of law is enunciated. The Ninth Circuit merely recognizes the parties to the collective bargaining agreement established eligibility requirement to assure a true dependant of the decedent received the benefits. The Court concluded the only eligible claimant is the appellee, Larry Gelfgren. Indeed Larry Gelfgren is the only person meeting the requirements of the plan once the domicile decision was resolved adversely to the appellee,

Rosalind Gelfgren. It is therefore submitted no further argument is required and the decision of the Ninth Circuit should be affirmed.

Respectfully submitted

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